

ORIGINAL  
BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of:	)	MM DOCKET No. 93-158
	)	
Amendment of Section 73.202(b)	)	RM No. 8239
Table of Allotments	)	
FM Broadcast Stations	)	
	)	
Hazlehurst, Utica and	)	
Vicksburg, Mississippi	)	

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To: The Commission

**OPPOSITION TO APPLICATION FOR REVIEW**

WILLIS BROADCASTING CORPORATION ("Willis") by Counsel, and pursuant to Section 1.115(d) of Rules, hereby respectfully submits its Opposition to the Application for Review of Donald B. Brady ("Brady") in the above-captioned proceeding filed on April 1, 1996. Willis respectfully requests that the Commission deny Brady's Application, and affirm the Staff's action in allotting Channel 265C2 to Utica, Mississippi. In support thereof, Willis states the following:

***Introduction***

1. On June 16, 1993, in response to a Petition for Rule Making filed by St. Pe' Broadcasting ("St. Pe'") the Commission released a *Notice of Proposed Rule Making and Order to Show Cause*, 8 FCC Rcd 4080 (1993), ("NPRM") in the above-captioned proceeding to substitute Channel 265C3 at Utica, Mississippi, and modify the license for Station WJXN (FM) to specify operation on the higher class channel. To accommodate the upgrade, St. Pe' also requested the substitution of Channel 267A for Channel 266A at Vicksburg, Mississippi, and modification of

the license for Station WBBV-FM and substitution of Channel 253A for Channel 265C3 at Hazlehurst, Mississippi, and modification of the license for Station WMDC-FM. The *NPRM* set August 9, 1993 as the date for filing of Comments in this proceeding. Willis, the assignee of Station WJXN (FM), timely filed Comments in support of the proposed substitutions.<sup>1</sup> St. Pe' timely filed a Counterproposal for substitution of Channel 265C2, rather than Channel 265C3 at Utica. St. Pe' also pointed out the Commission's error in the *NPRM* inviting expressions of interest in Channel 265C3, since St. Pe's initial proposal, and its subsequent counterproposal, constituted an *incompatible channel swap* under Commission policy,<sup>2</sup> and thus protected from competing expressions of interest.

2. Brady filed an untimely "Expression of Interest" on August 10, 1993. He attempted to deliver a copy of his Expression of Interest to the Commission *via* facsimile transmission on August 9, 1993. Later, on October 16, 1993, Brady filed a Contingent Motion for Leave to accept his late-filed Expression of Interest, citing the reasons why he was unable to file his Comments on the August 9, 1993 due date.<sup>3</sup>

3. On November 3, 1994, the Chief, Allocations Branch, released its *Report and Order*, DA 94-1201, in the above-captioned proceeding. The Staff noted its initial error in inviting comments expressing interest in the use of Channel

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<sup>1</sup>Willis is now the Licensee of Station WJXN (FM), pursuant to the Commission's grant of the application for assignment of WJXN (FM) on October 21, 1993.

<sup>2</sup>See *Modification of FM Broadcast License to Higher Class Co-channels or Adjacent Channels*, 60 RR 2d 114, 120 (1986). ("FM License Upgrading")

<sup>3</sup>A Request for Extraordinary Relief was also filed by Crossroads Communications, Inc., in connection with a separate Rule Making proceeding.

265C3, since the proposed upgrade and substitution constituted an incompatible channel swap, and that, as a consequence, Brady's Expression of Interest was unacceptable. The Staff also noted that Brady's Comments would have been unacceptable in any event, since they were not filed on or before the due date, and since they were not filed in accordance with §1.420(a) and (c) of the Commission's rules.<sup>4</sup> Accordingly, the Staff granted St. Pe's Counterproposal and substituted Channel 265C2 at Utica, Mississippi, as well as the other substitutions requested by St. Pe'.

4. On December 9, 1994 Brady filed a Petition for Reconsideration, contending that the release of a notice of proposed rule making constitutes final agency action precluding any subsequent correction of factual or legal error, and that the Staff was required to consider Brady's late-filed Expression of Interest. Willis filed an Opposition to Brady's petition on December 22, 1994.

5. On February 22, 1996, the Chief, Policy and Rules Division issued a *Memorandum Opinion and Order* (DA 96-175) denying in substance Brady's petition for reconsideration.<sup>5</sup> ("MO&O").

6. The Staff disagreed with Brady's contention that the *NPRM* in this proceeding (or in any proceeding) constitutes a final order. Citing *Glenwood Springs, Colorado*, BC Doc. No. 79-43, 46 RR 2d 1388-1389 (MMB, 1980), the Staff

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<sup>4</sup>Brady's Comments failed to include a pledge to reimburse the Vicksburg and Hazlehurst stations for expenses incurred in changing channels to accommodate the allotment of Channel 265 at Utica, MS (*MO&O* at ¶4).

<sup>5</sup>The Staff stated that, upon reconsideration it would consider Brady's late-filed Comments as having been timely filed. However, the Staff went on to conclude that this was harmless error that did not affect the outcome of the proceeding.

concluded that a notice of proposed rule making is but an interlocutory action. (*MO&O* at ¶8).

7. More important, the Staff disagreed with Brady's contention that the Utica proposal was not an "incompatible channel swap" under Commission policy because of the availability of Channel 282A at Hazlehurst, Mississippi. The Staff rejected Brady's argument that Channel 282A could be allotted at Hazlehurst because the substitution in this case would require a site change by an operating station, a burden the Commission has traditionally refused to impose in nonvoluntary FM Channel substitution proceedings. (*MO&O* at ¶10).<sup>6</sup>

8. On April 1, 1996, Brady filed the subject Application for Review of the Staff's denial of his petition for reconsideration. For the reasons set forth below, the Commission should deny review, and affirm the Staff's ruling.

**A. BRADY'S CONTENTION THAT HE WAS  
DENIED PARTICIPATION RIGHTS IS MOOT.**

9. In the subject Application for Review, Brady reiterates his previous arguments that a notice of proposed rule making is a final order as to participation by, and rights of parties.<sup>7</sup> This issue is a red herring since the Staff granted Brady reconsideration of his late-filed Comments to the extent of considering the merits

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<sup>6</sup>As previously noted, Brady's initial Comments did not even contain a pledge to reimburse the Hazlehurst Station for its expenses associated with a channel substitution. (*MO&O*, at ¶4).

<sup>7</sup>It seems clear, as a general principle of law, that the rights of parties cannot be fixed by the issuance, and "finality" of a notice of proposed rule making. For example, the filing of a counterproposal on the comment due date (but after the so-called "finality" date of the NPRM) can give participation rights to persons not previously affected. Moreover, the withdrawal of a proposal, can, in some instances, take away participation rights originally set forth in an NPRM.

of his arguments. As to the Staff's error in not initially pointing out that the St. Pe' Counterproposal was an incompatible channel swap, Brady's argument clearly fails. Brady is attempting to transform what is, at best a procedural right to participate, into an absolute rule that would preclude the Staff from correcting a *factual* error in an *on-going proceeding*.<sup>8</sup> Brady's repetitious arguments to the contrary are wrong as a matter of law, policy, and most of all, common sense.<sup>9</sup>

**B. THE STAFF'S CONCLUSION AS TO THE  
INCOMPATIBILITY OF THE CHANNEL SWAP  
IS CORRECT, AND SHOULD BE AFFIRMED.**

10. Brady also complains that the Staff's rejection of his assertion that Channel 282A was available to the Hazlehurst station was a "new", "novel" and "nonroutine" grafting of one Commission policy onto another. This is also an exercise in illogic. Brady does not deny the existence or validity of the "Forced Channel Change" policy which holds that a broadcast licensee may not be forced to accept a channel change that also requires a transmitter site change. Brady also cannot deny that the substitution of Channel 282A for the present Hazlehurst

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<sup>8</sup>It seems beyond dispute that the Staff can correct a factual error at any time during the proceeding. There is no public interest benefit to be obtained by adopted regulations based on mistake of fact. Even Brady would not suggest that the Staff would be precluded from correcting an error made in the reference coordinates of the proposed allotment in an NPRM. There is essentially no difference between that kind of error and the error initially made here.

<sup>9</sup>Brady's final argument with regard to finality is a case in point. Citing to *NBMC v FCC*, 791 F.2d 1016, 1622-23 (D.C. Cir. 1988), Brady asserts that the Staff failed to give adequate advance notice that it was correcting its previous statements regarding other expressions of interest. Supposing, however, that it had done so. Brady cannot demonstrate that he was prejudiced in any way because, as a *factual* matter, the Counterproposal *did* constitute an incompatible channel swap. As pointed out by the *MO&O*, the end result is the same: no other channel was available in Hazlehurst. Moreover, by granting reconsideration to Brady on the timeliness issue, the Staff effectively gave Brady his "day in court."

Channel would require a transmitter site change for WMDC-FM in Hazlehurst. To give effect to Brady's argument would be to radically change the Commission's existing policy on forced channel changes and force an existing licensee to move its transmitter site either at its own cost,<sup>10</sup> or force the proponent of an incompatible channel swap otherwise consistent with 47 CFR §1.420(g)(3) to pay for such a move. It is Brady, not the Staff, that is proposing a "new", "novel" and "nonroutine" matter that clearly would exceed the Staff's delegated authority under §0.283(b)(2) and (b)(6) of the Rules. Thus, Brady is wrong as a matter of law and policy, and the *MO&O* is correct. Accordingly, the Staff's action should be affirmed.

**C. ALLOTMENT OF CHANNEL 265C2 TO UTICA, MISSISSIPPI  
WOULD SERVE THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.**

11. The Commission should consider carefully whether the public interest equities in this case reside with Brady, who, while he claims harm and prejudice, has yet to demonstrate any, or Willis, who will be able to provide expanded broadcast service to the community of Utica and surrounding areas, and contribute to the overall diversity of broadcast voices in that area.<sup>11</sup>

12. At bottom, Brady is a spoiler who seeks to expand the private interest of an individual with a private agenda to thwart the Commission's remedial, public interest goals of promoting maximization of existing FM facilities.<sup>12</sup> His

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<sup>10</sup>As noted above, Brady did not agree to reimburse the Hazlehurst Station. (*MO&O* at ¶4).

<sup>11</sup>As the Commission's records will reflect, Willis Broadcasting Corporation is 100% minority owned (*Official Notice Requested*).

<sup>12</sup>See, e.g. FM Class C3 Stations (MM Doc. 88-375), 66 RR 2d 338, 341 (1989); *FM License Upgrading, Supra*, Note 5, 60 RR 2d at 118-119 (1986). While Brady

expression of interest in Channel 265C3 at Utica would not result in the allotment of that Channel there. No equivalent class channel is available without the Channel substitution at Hazlehurst and Vicksburg, which are the subject of this proceeding, and Brady has shown no public interest benefit in reversing the Commission's present policy on forced channel changes.

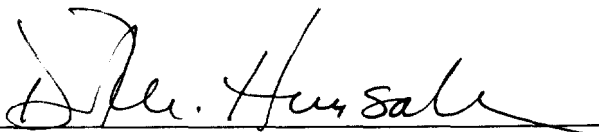
13. Even if Brady's inconsistent and illogical procedural requirements were considered to have merit, there is no merit to the substance of his claims. If the Commission were to reverse the Staff in this proceeding it would be exalting form over substance, creating an unworkable and self-defeating policy, and turning its back on the public interest.

***Conclusion***

WHEREFORE, the above premises considered, Willis respectfully urges the Commission to DENY the Application for Review of Donald B. Brady.

Respectfully submitted,

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harps about his *Ashbacker* rights being trampled upon, he offers no public interest reason why the incompatible channel swap doctrine should not be construed as liberally as possible in order to further the Commission's long stated goal of maximization of existing facilities. Moreover, in the *MO&O*, the Staff gave Brady his *Ashbacker* rights, duly considered his comments, and rejected them.

# CERTIFICATE OF SERVICE


I, Sharon L. Hinderer, Secretary in the Law Firm of **Putbrese, Hunsaker & Trent, P.C.**, hereby certify that I have on this 16th day of April, 1996, sent, by United States Mail, Postage prepaid, copies of the foregoing, "**Opposition To Application for Review**" to the following:

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